Office Supreme Court,
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JUL 16 1969
JOHN F. DAVIS, CLERK

No. 347

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

DAVID G. CAIN, et al., Appellants

v.

COMMONWEALTH OF KENTUCKY

Appellee

JURISDICTIONAL STATEMENT PURSUANT TO RULE 15

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JURISDICTIONAL STATEMENT PURSUANT TO RULE 15

Appellants are appealing the affirmance by the Court of Appeals of Kentucky of the judgment of conviction after trial before a jury in the Jefferson Circuit Court of Kentucky for violation of the Kentucky obscenity statute in connection with the exhibition of the motion picture film "I, a woman."

Opinions Below

The opinion of the Court of Appeals of Kentucky (Appendix, *infra* pp. 8-20) is not yet officially reported. There does not appear to be any opinion by Honorable J. Miles Pound, the trial Justice on the jury trial.*

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* As of the date of the preparation of this statement the record in the court below has not yet been received from the Clerk of the Court of Appeals of Kentucky. Appellants' motion to extend the time within which to docket the appeal was granted by an order signed by Honorable Potter Stewart dated June 18, 1969 to and including July 14, 1969. For this same reason it has not been possible to insert references to the record below in this statement.

Jurisdiction

Nature of Proceeding, State Statute Involved

Appellants were charged with, tried for, convicted after a jury trial and fined for bringing an assertedly obscene motion picture film entitled, "I, a woman" into the Commonwealth of Kentucky for exhibition with prior knowledge of its obscenity and for exhibiting an obscene motion picture with knowledge of its obscenity.

The proceeding below was brought under Section 436.101 of the Kentucky Revised Statute (Appendix, *infra*, pp. 22-25).

Date of Judgment Sought to be Reviewed and of Piling of Notice of Appeal

The opinion of the Court of Appeals of Kentucky affirming the lower Court's judgment of conviction assessing fines upon the jury verdict was rendered February 14, 1969. The mandate and judgment of the Court of Appeals of Kentucky was issued March 20, 1969. Notice of appeal was filed with the Court of Appeals of Kentucky on ~~April 2,~~ Jun. 16 1969.

Statute Conferring Jurisdiction on This Court

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(2).

Cases Sustaining Jurisdiction

Memoirs v. *Massachusetts*, 383 U. S. 413 (1966);
Lee Art Theatre, Inc. v. *Virginia*, 392 U. S. 636 (1968);
Austin v. *Kentucky*, 386 U.S. 767 (1967);
Interstate Circuit Inc. v. *City of Dallas*, 390 U. S. 676 (1968);
Joseph Burstyn, Inc. v. *Wilson*, 343 U. S. 495 (1952);

Kingsley Pictures Corp. v. *Regents*, 360 U. S. [illegible]
(1959);
Jacobellis v. *Ohio*, 378 U. S. 184 (1964);
A Quantity of Books v. *Kansas* (1964), [illegible] U. S.
205;
Marcus v. *Search Warrant* (1961), 367 U. S. [illegible].

Text of Kentucky Statute

The text of K.R.S. Section 436.101 will be found in the Appendix, *infra*, pp.

Questions Presented

Is the Kentucky criminal statute dealing with obscene matter under which appellants were convicted violative of the First and Fourteenth Amendments of the Constitution of the United States?

Was the manner in which defendants seized the print of the film involved in the suit violative of the First Amendment of the Constitution of the United States and the conviction of appellants as a result of such unconstitutional seizure thereby rendered void?

Statement

Appellant, Art Theatre Guild, Inc., is an Ohio corporation which operates a motion picture theatre, known as the Crescent Art Theatre, located on Frankfort Avenue in Louisville, Kentucky. Appellant, David Cain, is a resident of Louisville, Kentucky, and since November, 1966, has been the manager of the Crescent Art Theatre. Appellant, Saul Shiffrin, is a resident of New York, and is a vice president of the appellant corporation, Art Theatre Guild, Inc.

On May 28, 1967, a foreign language film with printed English sub-titles, known as "I, a woman" opened at the

at the Crescent Art Theatre. On June 7, 1967, officers of the Louisville Police Department Vice Squad, without prior warning or discussion of the film in question, and without any prior hearing, judicial or otherwise, ordered the theatre projectionist to turn over to them the print of the film, seized said film, and on the following day took out a warrant against appellant, Cain, for violation of K.R.S. 436.101. Appellant Cain surrendered himself on said warrant and was admitted to bail in the Louisville Police Court. Showing of the film in question was resumed at the aforesaid theatre and on June 9, 1967, officers of the Vice Squad of the Louisville Police Department again without a prior hearing seized the print of the film then being shown and, he being present on the theatre premises, arrested appellant Cain, and charged him with an additional violation of K.R.S. 436.101.

On June 13, 1967, the Jefferson County Grand Jury then sitting (as the result of a direct submission by the Commonwealth) returned an indictment against the three appellants herein as well as Carl W. Allen, a projectionist at the aforesaid theatre. (In consequence, the Police Court charges previously placed against Cain were filed away since these charges were merged in the indictment.)

On June 14, 1967, indictees Cain and Allen appeared in person in Jefferson Circuit Court, Criminal Branch, Second Division, and indictees Shiffrin and Art Theatre Guild, Inc., appeared by counsel, waived arraignment and entered not guilty pleas. On the same date the Commonwealth's Attorney, over the objection of counsel for the indictees, seized and retained a third print of the aforesaid film.

On the same date counsel for the indictees filed a written motion to dismiss the indictment which motion was assigned to be heard on June 23, 1967, trial of the cases being assigned at the same time to July 13, 1967.

On June 23, 1967, the pending motions were re-assigned to June 26, 1967, for hearing.

On June 26, 1967, the court overruled the motions to dismiss the indictments and re-assigned the case to July 13, 1967.

On July 13, 1967, motion to dismiss on behalf of defendant Allen was sustained by the court and the charges against the remaining indictees were passed for trial to August 11, 1967.

Thereafter the Commonwealth filed a motion for a jury trial refusing to consent to the waiver of jury trial theretofore made by defendants. The film was viewed by the court on July 15, and on August 3, 1967, a new motion to dismiss was filed on behalf of the appellants herein. The motion was passed to August 7, 1967.

On said date no ruling was made by the court as to the pending motion to dismiss, a stipulation of certain facts was filed and the cases set down for trial on August 9, 1967.

On August 9th and 10th, before a jury, the three appellants herein were tried and convicted of the various charges as shown in the jury verdict. The instructions to the jury by the court appear in the record.

Written motion for a new trial on behalf of all appellants was filed on August 15, 1967.

Motion for a new trial was overruled by the court on August 19, 1967 (said date having been corrected by the court subsequent to the preparation of the record herein and such correction having been filed with motion in this court made by appellants on February 16, 1968); judgment being entered in the same order overruling said motion.

The constitutional questions of unlawful search and seizure and that the statute involved violated the federal constitution were raised in the first instance by motions to dismiss and again at trial and during the trial by objection

to admission of evidence tainted by unconstitutionality. The court below overruled all objections. (Since the record has not been transmitted by the Clerk of the Kentucky Court of Appeals, it is not possible in this Statement to give quotations from the record nor to refer to the pages of the record.)

As is evidenced by the opinion of the Kentucky Court of Appeals there were five grounds asserted before that court for a reversal of the conviction, the first two of which involved a challenge to the constitutionality under the First and Fourteenth Amendments of the U. S. Constitution of the statute under which appellants were convicted.

The unconstitutionality of the seizure was raised in the court of first instance by evidentiary motions and by motion in the preliminary stages to suppress.

Substantiality of Federal Question

The issues presented by the appeal raise fundamental constitutional questions in the area of free speech and unlawful search and seizure. Individual defendants have been convicted of criminal obscenity charges relating to the same motion picture held not obscene by the Supreme Court of Tennessee in an opinion filed January 12, 1968 and by the United States District Court for the northern district of Illinois at Chicago in an opinion by the Honorable Abraham Marovitz in *Audubon Films* v. *State of Illinois*.

The opinion of the Court of Appeals of Kentucky is directly contrary to the opinion of this court in *Austin* v. *Kentucky*, 386 U. S. 767, with regard to the application of the scienter requirement in a criminal obscenity prosecution.

The opinion of the Kentucky court specifically and categorically declines to follow the decision of this court in *Memoirs, supra,* for the ostensible reason that this court's

opinion in *Memoirs* did not require a state statute to include the "utterly without redeeming social value" test for the statute to be valid, since that test was only espoused by three of the Justices of this court.

The Kentucky court completely ignored the decision of this court in *Lee Art, supra,* which decision clearly mandates a reversal of the convictions because of the procedures following in the seizure of the prints of the film involved without in any case an initial adversary hearing under jurisdictional supervision on the question of obscenity.

Respectfully submitted,

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July, 1969.

APPENDIX

Opinion of Court of Appeals of Kentucky.

Rendered: February 14, 1969

COURT OF APPEALS OF KENTUCKY

DAVID G. CAIN, ET AL — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT

HON. J. MILES POUND, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUDGE OSBORNE

AFFIRMING

The defendants were convicted after a jury trial in the Jefferson Circuit Court on two separate charges: one, of bringing an obscene motion picture film, "I, A Woman," into the Commonwealth of Kentucky for exhibition, with prior knowledge of its obscenity; and, two, of exhibiting an obscene motion picture entitled, "I, A Woman," with knowledge of its obscenity.

This appeal is from a judgment of conviction assessing fines upon the jury verdict.[1] They are now contending that the judgment of the trial court should be reversed for the following reasons:

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[1] The jury fixed punishment upon the various defendants as follows:

Saul Shiffrin	Count one	$1000
Saul Shiffrin	Count two	1000
David G. Cain	Count four	500
David G. Cain	Count five	500
David G. Cain	Count six	500
David G. Cain	Count three	Not guilty

1. That the statute under which they were convicted, KRS 436.010, is unconstitutional because it is in violation of the First and Fourteenth Amendments of the Constitution of the United States.

2. That the statute, if not unconstitutional, is so conflicting and inconsistent in its provisions that it can not be executed and is, therefore, void because of its ambiguity.

3. That the judgment should be reversed because the trial court excluded all expert testimony concerning the film and the conviction was based upon an exhibition of the film itself.

4. That the trial court admitted irrelevant, improper and prejudicial testimony.

5. That the trial court improperly refused to direct a verdict of acquittal since the film was not proven obscene.

There were other issues raised in the trial court, but since they are not stated as grounds for reversal upon this appeal and are not listed in the points and authorities, they are deemed waived and will not be considered. The points relied upon for reversal will be considered in their respective order.

KRS 436.101 makes it unlawful for any person to knowingly send or cause to be sent for the purpose of sale or distribution in this state, or to distribute in this state, or to possess for the purpose of distribution, or to exhibit any obscene matter. Obscenity is defined in the statute to mean material in which, "to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters."

Appellants point out that motion picture films are entitled to the constitutional protection of freedom of speech awarded by the First and Fourteenth Amendment. They cite in support of this contention Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 3 L.Ed. 2d 1512, 79 S.Ct. 1362. Although there may be many sound arguments why this should not be so, it is nevertheless true that the Supreme Court of the United States has so held and by this we are bound. However, we do not believe the Supreme Court has held this statute or those of similar import to be unconstitutional per se. In Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304, the court upheld the constitutionality of state anti-obscenity statutes and there approved the phraseology of a California statute and a federal statute. In that case the court approved the definition of obscenity formulated by the American Law Institute in its Model Penal Code, section 207.10(2). In a footnote to the Roth-Albert opinion, the court stated:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the American Law Institute, Model Penal Code, Section 207.10(2) (Tentative Draft No. 6, 1957), viz.: . . . 'A predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .'"

We have found no case subsequent to the Roth opinion which has retracted, modified or overruled the above language. It is contended in appellants' brief that the court in Redrup v. New York, 386 U.S. 767, 18 L.Ed.2d 515, 87 S.Ct. 1414, has in effect modified this language and partially limited state control of obscenity to the three areas of juveniles, invasion of privacy and pandering. Our analysis of this opinion and those opinions cited therein

leaves us with much doubt as to exactly what the court intended. This doubt is compounded by the action in Miskin v. New York, 383 U.S. 502, wherein the court, by a clear majority opinion, affirmed a Michigan conviction for selling and distributing obscene material. This case did not involve juveniles, invasion of privacy or pandering and as far as we can tell the principles enunciated therein are still in full force and effect for it was cited with approval in Ginzburg v. U. S., 383 U.S. 463, 20 L.Ed.2d, 195 (April, 1968).

We do not interpret the Redrup v. New York opinion as being controlling upon the issue here before us for the simple reason that there was no clear majority of the court in support of any of the numerous principles set out therein. Appellants further contend that the legal test of obscenity was modified in Memoirs v. Massachusetts, 383 U.S. 413, 418, 16 L.Ed.2d 1, 5, 86 S.Ct. 975 (1966) and as a result of that opinion a third separate independent test is added to the requirements of our present statute and that is that the material must be utterly without redeeming social value." We do not read this requirement in the case for the reason that this again was a no clear majority opinion. The test was joined in by only three justices of the court. Conceding that these three justices interpreted the Memoirs case as making the redeeming social value test a new factor for the determination of obscenity, this test was not approved by the other justices of the court and, therefore, in our opinion it has not become the law on this subject. We have examined the Roth-Albert case, supra, and believe it still to be controlling authority upon the test of what is obscenity and KRS 436.101 is in conformity with the test therein approved. The fact that the trial court submitted to the jury the additional test as to whether the material was utterly without social value only made the instruction more favorable to the appellants than they were entitled to under the law. For the foregoing reasons, we are of the opinion that KRS 436.101 is constitutional.

Appellants' second contention is that the statute is fatally contradictory upon its face. The thrust of this argument centers around two words, the words "content" and "obscenity." It will be noted that our statute makes it unlawful to transport, etc., any material having knowledge of the "obscenity" thereof. They point out that the Supreme Court in requiring scienter phrased the requirement in terms to require the guilty party to have knowledge of the "content." As we construe this language the knowledge of obscenity means nothing more than the knowledge of the contents of the material. The Superior Court of California has dealt with this in People v. Pinkus, 63 Cal. Rptr. 680, and we are in full accord with the treatment given there. The California court said and we agree:

> "We cannot impute to the Legislature an intent to employ the words 'knowledge that the material is obscene' in a sense that would render prosecutions under Penal Code Section 311.2 an impossibility. Awareness of the contents of a matter and that it is of obscene character or nature was all that was intended and all that is constitutionally required."

Therefore, we do not believe there would be any contradiction in the statute that would render it fatally defective.

Appellants' third contention is that the judgment should be reversed because the trial court excluded expert opinion testimony and based its conviction upon the exhibition of the film itself. Space here does not permit a lengthy explanation of the history and place in our law of opinion testimony. For those who are interested, it may be found in *Wigmore on Evidence*, Vol. 7, 3rd Ed., section 1917 et seq. A thumbnail synopsis of the matter is that prior to 1700 only facts were received in Anglo-Saxon courts as the basis of a judgment. The right to exercise an opinion was reserved to the court or to the jury. However, there gradually developed over the years, first, a rule that permitted those who were expert in a field and had special knowledge

to give conclusory opinions upon established facts, especially when the opinion required special or scientific training. Later there evolved a principle which permitted lay witnesses who were not especially trained to render conclusions upon complicated facts that could not properly be brought or presented before the jury. This rule principally evolved out of cases involving values of property and insanity. It has never been the law and is not the law today that a party in litigation has the right to present opinion evidence by lay witnesses on matters that can as easily be interpreted by the jury. The jury should be permitted to draw its own conclusions. The rule is stated in *Wigmore on Evidence*, Vol. 2, 3rd Ed., p. 637, § 557:

> "There is a rule of Evidence (post, § 1918) which excludes, on the ground of superfluity, testimony which speaks to the jury on matters for which all the materials for judgment are already before the jury. This testimony is excluded simply because, being useless, it involves an unnecessary consumption of time and a cumbersome addition to the mass of testimony. In the majority of instances the testimony thus excluded will consist of an 'opinion' by the witness, i.e., a judgment or inference from other facts, as premises, and it will be excluded because the other facts are already or may be brought sufficiently before the tribunal. . . ."

The expert witness, whom appellants proposed to call, was a gentleman from New York. It was inconceivable that he could have a better opinion of the community standards of Louisville, Kentucky, than the twelve jurors sworn to try the case. It was inconceivable that he could portray more vividly or more realistically the contents of the film to be shown than would be revealed by showing the film itself. It was not shown or demonstrated by the record that he was a person learned in the law so we do not believe he could give to the jury a better definition of obscenity than was obtained in the instructions of the court. In short,

we fail to see how his opinion one way or the other could be of any value to the jury in determining whether or not the film viewed by them violated the laws of obscenity of this Commonwealth. This being true, the trial judge undoubtedly had the authority to exclude the testimony.[2] We are not alone in this position. In State v. Smith, Mo., 422 S. W. 2d 50 (November 13, 1967), the Missouri Supreme Court in an obscenity case involving the book, *Candy*, made this observation: "In the field of obscenity the average citizen is as capable of judging the publication as an alleged expert." The court went ahead to observe that it could see no reason to admit the substitution of the opinion of authors and critics for that of the average person in matters of this kind as it required little perception to conceive that the actual content of the material may negate the endorsement or testimonial of all experts or sophisticates.

The same result was reached in California v. Pinkus, 63 Cal. Rptr. 680 (October 26, 1967). There the court held it was not a constitutional requirement that expert testimony be received if the necessary elements could be established by other proof. The court pointed out that the jury represented a cross section of the community and had a special aptitude for expressing the view of the average person. We believe it to be academic that a state is not barred from considering the trier of fact as the embodiment of the community standards. There can be no doubt but what the jury is competent to judge whether a work is obscene when these standards are applied. In support of their contentions on this point, appellants rely primarily upon a concurring opinion by Mr. Justice Douglas in Memoirs v. Massachusetts, supra. The opinions of Mr. Justice Douglas, when they are only for himself, do not constitute law upon this matter. Mr. Justice Douglas has never purported to follow the law established by his court or any other

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[2] There was no contention the film was exempt as scientific or educational under § 7 of the Statute. A defense under this section might require expert testimony.

court where matters of obscenity are involved. This fact was noted by Mr. Justice Harlan recently in Interstate Circuit, Inc. v. Dallas, 20 L. Ed. 2d 225 at 244 (April 1, 1968) when he remarked:

> "Two members of the Court steadfastly maintain that the First and Fourteenth Amendments render society powerless to protect itself against the dissemination of even the filthiest materials. No other member of the Court, past or present, has ever stated his acceptance of that point of view. . . ."

We are of the opinion that no error was committed by the trial court in the exclusion of opinion evidence regarding the film in view of the fact that the film itself was exhibited to the jury. If the exclusion had been error in our opinion it would not have been prejudicial to the rights of the appellants on this appeal as no avowal was taken.

Appellants' fourth contention of error is that the trial court admitted irrelevant, improper and prejudicial testimony. This controversy centers about the fact that the court without objection allowed certain questions and answers showing that the theatre had changed its mode of operation, including its showing hours, which would demonstrate to the jury that it had altered the type of material normally shown. Some of these questions related to acts that had been done subsequent to the time of the seizure of the film, "I, A Woman." When counsel for appellants objected, the trial court sustained the objection. Counsel then requested that the jury be admonished not to consider the matter and the trial court admonished: "I think the jury can see for itself." The questions could have been objected to at the time they were asked and a ruling requested of the court at that time. Appellants were a little late in waiting until a series of questions had been answered before making their objection. However, without passing upon this point, we are of the

opinion that the matter presented was not prejudicial. Another portion of the testimony showing that cuts were made in the film prior to its showing was relevant to the question of scienter. It was calculated to show that appellants had knowledge of the "contents" of the material which they were displaying. Otherwise they would not have altered it. The questions concerning the hours of operation and change of those hours were calculated to show that the theatre management was attempting to alter the make-up of the audience in order to change the material which would be shown. Circumstances under which alleged obscene and pornographic material is presented are relevant to determine whether social importance claimed for the material is in fact a reality. Ginzburg v. United States, supra. For the foregoing reasons we are of the opinion that these facts probably were competent even though some of them transpired after the date of the showing of this particular movie. They demonstrated a mode, manner and practice of doing business which directly related to the type of material being presented by the theatre. In our opinion, this evidence not only had some probative value on the obscenity issue but also on appellants' knowledge that this film represented a departure from those of customary standards, which are shown to normal theatre audiences.

Appellants' fifth and final contention is they were entitled to a directed verdict of acquittal because the film shown was not proven to be obscene. As we view this matter, it is not the function of this court or any other appellate court to determine whether the material shown is obscene. This is a factual determination to be made by a jury. The film was shown to the jury and they found it obscene. Our function as an appellate court is limited to determining whether the evidence in the record supports the findings of the jury. If so, the verdict must stand. This law is so basic and ancient to the principles of English and American jurisprudence and so elementary

in its application as a principle of appellate procedure that we do not feel called upon to cite authorities for its support.

We have viewed the evidence presented to the trial jury. The film is a 90-minute motion picture devoted almost entirely to the sexual encounters of one female by the name of Eve. It opens by showing Eve nude in her bedchamber engaged in the practice of caressing herself in a suggestive manner to the accompaniment of her father's violin. She progresses to a passionate love scene with her fiance, Svend, while lying fully clothed on top of him in her bedchamber. This act is performed with the camera full on the subject. From this the film proceeds to the act of intercourse with a married patient, Heinz Goertzen, in a hospital room where Eve is employed as a nurse. This act she solicits with the use of nude photographs taken of her by her fiance for this specific purpose. During the course of the sequence, the camera focuses upon the head of the male partner and the stomach area of the female partner. It shows the male partner caressing with kisses the area between the naval and the pubic hair. The camera then shifts during the act of intercourse to the face of the female subject. After this, the film follows the life of Eve from one act of sexual intercourse to another until it has been accomplished some five times, all with different partners. Each time the act is as vividly portrayed upon the screen as was the scene in the hospital room. In one instance the sex act is in the form of rape. The film represents nothing more than a biography of sexuality. There is no story told in the film: it is nothing more than repetitious episodes of nymphomania. Nudity is exposed in such manner that if the subject had posed in person instead of on film, she would have immediately been arrested for indecent exposure. We are of the opinion that the jury not only had sufficient evidence before it upon which to base its verdict but that this evidence was overwhelming. The Supreme Court of the United States held in the Roth case that obscenity is not protected by the

First and Fourteenth Amendments to the Constitution of the United States. As far as we have been able to determine, this holding has never been reversed or modified. The court has occupied itself since that ruling in a somewhat futile attempt to determine what is obscene and what is not obscene. This problem has given the judiciary of this country the greatest challenge of its history and as of the date of this opinion the judicial record reflects nothing more than indecision and failure.

While the courts have vacillated and over-explained, divided and fought, the sentiments of the people of this country have been clear and unassailable. All fifty states of this nation have obscenity laws. From the years of 1800 to 1856, the Congress of the United States passed 20 acts dealing with obscenity. It seems to be universally believed everywhere, except in the halls of the judiciary, that obscenity as such is not entitled to the constitutional protection awarded free speech.

Many times the right to pose a question is tantamount to the right to answer or at least partially so. Down through the years we have been asking ourselves when dealing with pornography and obscenity, "Is it harmful?" Of course, this answer can not come without a certain amount of reservation because the proof is hard to come by and often inconclusive. Therefore, we keep asking the same question and giving the same answers with reservations. If we were to change the form of the question and ask, "Is it beneficial?" the answer would come loud and clear. Certainly no benefit can come to any individual or any society by the use or dissemination of pornographic and obscene material. This being so why should we longer expend the time and energies of the greatest minds of this country in preserving its presence upon the newsstands and in the theatres. It is our opinion that the jury had sufficient evidence before it to hold the film obscene. There can be no doubt but what it is without any redeeming social value whatsoever; that it appeals to the prurient

interests and that it deals exclusively with sex. For these reasons we are of the opinion that it is not entitled to the protection of the First and Fourteenth Amendments of the Constitution of the United States.

The judgment is affirmed.

All concur.

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Mandate and Judgment of Kentucky Court of Appeals.

THE COMMONWEALTH OF KENTUCKY, / Winter Term—
THE COURT OF APPEALS / February 14, 1969

David G. Cain, et al	Appeal from a judgment of the Criminal Branch—Second Div.
vs	Jefferson Circuit Court
Commonwealth of Kentucky	CR 134854

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that the judgment is affirmed and the appellee recover of the appellants 10% damages on the amount of the judgment superseded herein; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellants its cost herein expended.

A copy—Attest:

DICK VERMILLION, C. C. A.
By JOHN C. SCOTT, C. D. C.

Issued March 20, 1969

Kentucky Revised Statutes.

Chapter 436

Offenses against Morality

436.101 Obscene matter, distribution, penalties, destruction.

(1) As used in this section:

(a) "Distribute" means to transfer possession of, whether with or without consideration.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.

(d) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(1966 c 40, § 1. Eff. 6-16-66)

(2) Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than $1,000

plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars, or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 365 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this subsection, he is punishable by fine of not more than $2,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed $25,000, or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If a person has been twice convicted of a violation of this section, a violation of this subsection is punishable by imprisonment in the state penitentiary not exceeding five years.

(1966 c 40, § 2. Eff. 6-16-66)

(3) Any person, who with knowledge that a person is a minor under eighteen years of age, or who, while in possession of such facts that he should reasonably know that a person is a minor under eighteen years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter, having knowledge of the obscenity thereof, to a minor under eighteen years of age is punishable by fine of not more than $2,000 or by imprisonment in the county jail for not more than one year, or both. If a person has been previously convicted of a violation of subsection (3) or (4), he is punishable by imprisonment in the state penitentiary not exceeding five years.

(1966 c 40, § 3. Eff. 6-16-66)

(4) Any person who, with knowledge that a person is a minor under eighteen years of age, or who, while in possession of such facts that he should reasonably know that

such person is a minor under eighteen years of age hires, employs, or uses such minor to do or assist in doing any of the acts described in subsection (2), is punishable by fine of not more than $2,000 or by imprisonment in the county jail for not more than one year, or both. If a person has been previously convicted of a violation of subsections (3) or (4), he is punishable by imprisonment in the state penitentiary not exceeding five years.

(1966 c 40, § 4. Eff. 6-16-66)

(5) Any person, having knowledge of the obscenity of such matter, who writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of obscene matter is punishable by fine of not more than $500 or imprisonment in the county jail for not more than six months, or both.

(1966 c 40, § 5. Eff. 6-16-66)

(6) Any person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter, is punishable by fine of not more than $1,000 or by imprisonment in the county jail for not more than six months, or both. For a second and subsequent offense he shall be punished by a fine of not more than $2,000, or by imprisonment in the county jail for not more than one year, or both. If such person has been twice convicted of a violation of this section, a violation of subsection (6) is punishable by imprisonment in the state penitentiary not exceeding five years.

(1966 c 40, § 6. Eff. 6-16-66)

(7) The prohibitions and penalties imposed hereby shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for conduct which would, except for such justification, be criminal under this chapter.

(1966 c 40, § 7. Eff. 6-16-66)

(8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the ..... (title or description of matter) to be obscene," or, "We find the ..... (title or description of matter) no to be obscene," as they may find each item is or is not obscene.

(1966 c 40, § 8. Eff. 6-16-66)

(9) Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the Attorney General Commonwealth's attorney, county attorney, city attorney or their authorized assistants, or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control. (1966 c 40, § 9. Eff. 6-16-66)

Office-Supreme Court,
FILED
NOV 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 347, October Term, 1969

DAVID G. CAIN, ET AL.----------APPELLANTS

V.

COMMONWEALTH OF KENTUCKY----------APPELLEE

MOTION TO DISMISS AND/OR AFFIRM

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Supreme Court of the United States

No. 347, October Term, 1969

DAVID G. CAIN, ET AL. ..... *Appellants*

V.

COMMONWEALTH OF KENTUCKY ..... *Appellee*

MOTION TO DISMISS AND/OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves that the appeal be disinissed, or in the alternative, that the final judgment of the Court of Appeals of Kentucky be affirmed, and as grounds for this motion states:

1. The opinion of the Kentucky Court of Appeals, reported in 437 S.W. 2d 769, sets forth five grounds asserted for reversal upon appeal. Two of these grounds involved an attack upon the constitutionality or validity of the state obscenity statute, KRS 436.101. The state appellate court noted that any other grounds which could have been raised were not presented on appeal and were therefore waived.

2. Appellants seek to present to this Court the question of the manner in which police officers seized the print of the film, contending that it was unconstitutional to seize it without an initial adversary proceeding under judicial supervision to determine its obscenity, whereby the convictions must be reversed. This question was not raised or argued before the Kentucky

Court of Appeals and was not passed upon. It cannot, therefore, be considered by this Court upon appeal from the judgment of the highest court of Kentucky. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940); *State Farm Mutual Ins. Co. v. Dyel*, 324 U.S. 154 (1945).

3. Appellants did not raise the question of unconstitutional seizure of the film in the trial court. Neither the motions to dismiss the indictment filed on June 14, 1967 and August 3, 1967, nor the motion for a new trial filed on August 15, 1967, raised any question about the legality of the seizure of the film. No objections were made during the trial to the admission of evidence of the film on the ground that it had been unconstitutionally seized. No preliminary motion to suppress the evidence prior to trial was made. It is believed that it would have been possible under Kentucky procedure for appellants to have made a motion following seizure of the film for return of the film, coupled with a request for a judicial hearing and determination of whether or not the film was constitutionally protected as non-obscene. But this was not attempted. This Court is without power to decide whether constitutional rights have been violated when the Federal question was not seasonably raised in accordance with state law. *Edelman v. California*, 344 U.S. 357 (1953).

4. The attack upon the constitutionality of the statute in the Kentucky Court of Appeals was based on two grounds, which were: (a) that this Court in *Redrup v. New York*, 386 U.S. 767 (1967), limited state control in the area of obscenity to juveniles, invasion of privacy, and pandering, whereby the Kentucky statute could not constitutionally be applied to the theater manager in this case; and (b) that the statute contains a constitutionally defective definition of obscenity. It is apparent from the opinion of the Court of Appeals in *Cain v. Commonwealth*, Ky., 437 S.W. 2d 769 (1969), that these questions were correctly resolved in favor of the constitutionality of the statute. The Kentucky statute was enacted in 1966 and is a "model law" pat-

terned after the American Law Institute Model Penal Code drafts on obscenity. The A.L.I. Model Penal Code has been cited repeatedly with approval by this Court in its majority opinions.

5. The construction placed upon the Kentucky statute by the Court of Appeals regarding the element of scienter is reasonable and accords with constitutional requirements. This Court has held that actual subjective knowledge is not necessary and that a standard of reckless conduct in trafficking in material meets constitutional requirements. *Mishkin v. New York*, 383 U.S. 502 (1966). All that is constitutionally required is an awareness of the contents of the material and that it is of obscene character or nature.

6. The film "I, A Woman" was found to be obscene by a Kentucky jury representing a cross-section of the community. It is significant that the determination of the factual question of obscenity was made by a jury and does not represent merely the opinion of a judge or court. However, the Kentucky Court of Appeals also stated in 137 S.W. 2d 769 at 775:

> "... It is our opinion that the jury had sufficient evidence before it to hold the film obscene. There can be no doubt but what it is without any redeeming social value whatsoever; that it appeals to the prurient interests and that it deals exclusively with sex. For these reasons we are of the opinion that it is not entitled to the protection of the First and Fourteenth Amendments of the Constitution of the United States."

WHEREFORE, the appeal should be dismissed, or in the alternative the judgment of the Kentucky Court of Appeals should be affirmed on the ground that of the two questions set out in the Jurisdictional Statement, one was not presented to or passed upon by the highest court (or by any court) of the state, and the elements of the other question as to the con-

stitutionality of the statute were clearly decided correctly by the state appellate court.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

FILED
APR 27 1970
JOHN F. DAVIS, CLERK

October Term, 1969
No. 347

DAVID G. CAIN, *et al.*,

Appellants,

vs.

COMMONWEALTH OF KENTUCKY,

Appellee.

On Appeal From the Court of Appeals of Kentucky.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

October Term, 1969
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DAVID G. CAIN, *et al.*,

Appellants,

vs.

COMMONWEALTH OF KENTUCKY,

Appellee.

On Appeal From the Court of Appeals of Kentucky.

PETITION FOR REHEARING.

Petitioner, Commonwealth of Kentucky, prays that a rehearing be granted of this Court's decision of March 23, 1970, reversing the judgment of the Jefferson Circuit Court of Jefferson County in the above-entitled case, and that the case be ordered restored to the docket for argument at the next term of Court on the first question presented in the Jurisdictional Statement:

> "Is Kentucky's criminal statute dealing with obscene matter under which appellants were convicted violative of the First and Fourteenth Amendments of the Constitution of the United States?"

The issues which arise out of an application of the Kentucky obscenity statute to the motion picture film

"I A Woman", are common to those presently under consideration by this Court in *Grove Press Inc. v. Maryland State Board of Censors*, October Term, 1969, No. 905, jurisdiction noted March 23, 1970 and *Batchelor v. Stein*, October Term, 1969, No. 565, jurisdiction noted Dec. 8, 1969. We understand that those cases will not be set for argument until the October 1970 Term, and therefore request that this Court revoke its previous ruling and place the matter on the summary calendar for argument following No. 905.

REASONS FOR GRANTING REHEARING AND RESTORING CASE TO DOCKET FOR ARGUMENT ON QUESTION 1.

I.

The Court Is Risking Embarrassment by Failing to Focus "Searchingly" on the Obscenity Vel Non Issue. Briefing and Oral Argument on That Issue Is, at the Very Least, "Insurance" That the Court Will Not Blunder.

In *Cain*, this Court, without benefit of briefing or argument on the merits, granted the appeal and reversed a unanimous judgment of the Court of Appeals of Kentucky which had held that the film "I A Woman" was obscene under the laws of the State of Kentucky. In our view this Court has unnecessarily placed itself at a disadvantage in the resolution of this critical problem of obscenity in motion picture films—a problem which is presently facing governments in every state in the union.

In support of this contention we point out that on the same date that it decided *Cain*, this Court also noted jurisdiction in *Grove Press Inc. v. Maryland State Board of Censors*, October Term, 1969, No. 905, which

case focused on the same issue raised in *Cain i.e.*, the power of the States of Maryland under its obscenity law to deal with motion picture films—in that case the motion picture film, "I Am Curious (Yellow)". We submit that fairness requires that the Attorney General of Kentucky be permitted the same opportunity as the Attorney General of Maryland to lend advocacy in support of the position taken by the judiciary in his state which, unlike the result in Maryland, was a unanimous one.

In failing to call for briefs in *Cain* on the obscenity *vel non* issue, this Court has unnecessarily cut off the flow of vital information and adversary contention. Time and again, this Court has, in a different context, mandated that the judicial body must "focus searchingly on the question of obscenity." *Lee Arts Theater Inc. v. Virginia*, 392 U.S. 636, 638, 20 L. Ed. 2d 1313, 1315, 88 S. Ct. 2103 (June 17, 1968), citing *Marcus v. Search Warrants*, 367 U.S. 717, 731-732, 6 L. Ed. 2d 1127, 1135, 1136, 81 S. Ct. 1708 and *Friedman v. Maryland*, 380 U.S. 51, 58-59, 14 L. Ed. 2d 649, 654, 655, 85 S. Ct. 734. We submit that the interests of the state require no lesser treatment.

It appears from the cursory treatment accorded the subject matter, that this Court's inquiry into the merits of "I A Woman" must have been superficial. We submit that the Court will find it impossible to justify a rule of law which prohibits fornication in public as against public policy, but requires, as a constitutional right, that it be subject to being photographed as an incident to entertainment, magnified by enlargement, on the screen, attractively illustrated with graphic sound and music, and exhibited to a live paying audience. Com-

pare *Trans Lux Dist. Corp. v. oard of Regents,* 14 N.Y. 2d 88, 248 N.Y.S. 2d 857, reversed on other grounds in 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 950. If this is permissible, why not a live performance in public to a consenting paying audience?

This Court should searchingly explore to see whether this film was really exhibited as an "honest artistic expression" or "created and exploited entirely on the basis of its appeal to prurient interests". *Ginzburg v. U.S.*, 383 U.S. 463, 474, 16 L. Ed. 2d 31, 40, 86 S. Ct. 942. An examination of the "trailers" offered to the public would, in our opinion establish that the film was "exploited" as "graphic matter openly advertised to appeal to the erotic interest of their customers," which *Ginzburg* teaches us is pandering 383 U.S. 463. His Court had originally considered examining a copy of the film supported by Audubon Films. A searching examination should also require the submission of a copy of the "previews" which were used to advertise the film. The previews are also available from the Westchester County District Attorney in White Plains, New York whose judgment was that there was probable cause to authorize the issuance of a search warrant and who seized the previews under a search warrant. *People of the State of New York v. Steinberg,* 304 N.Y.S. 2d 858 at 861.

We submit that this Court cannot and should not shut its eyes to these and other events which are occurring outside the Courtroom. Respondent should be permitted to lay before this Court, and document through narrative, the case history and opposition to "I A Woman" in other states. This court should recognize that "I A Woman" is not just another lewd

film. It was one of the first major attempts to move the skid row skin flick into the neighborhood theater. See, for example, *Metzger v. Pearcy*, 393 F. 2d 202 (Apr. 29, 1968). *Metzger v. Illinois* and the federal district court decision of Judge Abraham L. Marovitz in the Northern District of Illinois No. 67C2194 (June 19, 1968), unreported, the role which "I A Woman" played in the mushrooming development of the sexploitation film and the deleterious effect that its clearance will have on law enforcement efforts to contain obscenity in the films should be permitted to be developed by full briefing on the obscenity *vel non* issue. Certainly this court must recognize that the *Cain* case and "I A Woman" film is just as important as a resolution of the "I Am Curious Yellow" controversy.

II.

This Court's Brief Opinion of March 23, 1970, Reading "Per Curiam, the Judgment Is Reversed. Redrup v. New York, 386 U.S. 767" (Justices Burger and Harlan Dissenting) Sheds No Light on the Constitutional Issues Raised Herein, and Fails to Provide Kentucky Law Enforcement With the Definitive Guideposts Necessary for a Practical Resolution of the Obscenity Problem.

The sole authority cited in support of the reversal herein, *Redrup v. New York*, 386 N.Y. 767, (referred to popularly as the *"Redrup-Austin-Gent"* decision) was itself a brief *per curiam* decision handed down in May of 1967 by a badly divided membership on this Court. Since its inception, the *Redrup-Austin-Gent* decision has come under serious critical attack. See, for example, the analysis of the *Redrup-Austin-Gent* and other compan-

ion rulings appearing as Exhibit 51* in Hearings Before the Committee on the Judiciary United States Senate, Ninetieth Congress, Second Session on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States, pages 1171 *et seq.* See also *Cain v. Commonwealth of Kentucky*, 437 S.W. 2d 769 at 771; *Huffman v. United States*, 250 A. 2d 842 at 844, footnote 3. *Dykema v. Bloss*, 169 N.W. 2d 367 at 372; *State of Florida v. Reese*, 222 So. 2d 732 at 736; *City of Youngstown v. De Loreto*, 254 N.E. 2d 490 at 502; *Wagonheim v. Maryland State Board of Censors*, 258 A. 2d 240, at 252 (concurring opinion of Justice Barnes).

A casual reading of *People of the State of [illegible] v. Virgil Billingsley et al.*, 173 N.W. [illegible] ation of the subject matter [illegible] to make it crystal clear that any benefit [illegible] from *Redrup* is non-existent. Compare also the observations of the Oregon Supreme Court in *State of Oregon v. Childs*, 447 P. 2d 504 (Nov. 20, 1968), certiorari denied in 394 U.S. 931, 22 L. Ed. 2d 460, 89 S. Ct. 1198 (Mar. 24, 1969) with those of Federal District Judge Soloman in *Childs v. State of Oregon*, 300 F. Supp. 649 (June 23, 1969) and the trial judges opinions in *United States v. 4400 Copies of Magazines*, 256 F. Supp. 902 at 903 and *United States v. 77 Cartons of Magazines*, 300 F. Supp. 851 at 853.

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*A 16 mm. motion picture documentary film, 57 min. entitled "A REPORT ON THE UNITED STATES SUPREME COURT AND ITS RECENT DECISIONS ON OBSCENITY CASES" based upon the content of Exhibit 51 was annexed as Appendix "A" to an amicus curiae brief filed by the Citizens for Decent Literature Inc. in the Court of Appeals of Kentucky in the *Cain* case. On Jan. 28, 1969 the Court of Appeals reviewed the film and, on February 14, 1969 handed down its decision.

III.

The Kentucky Court of Appeal's Holding That a State Is Not Barred From Considering the Trier of Fact as the Embodiment of the Community Standards" Deserves a Ruling on Its Merits as Applied to the Motion Picture Film "I, A Woman."

Both *Austin v. Commonwealth of Kentucky* and *Cain v. Commonwealth of Kentucky* (supra, p. 773) were tried to a jury and the obscenity issue resolved by that body. The judicial system in Kentucky unanimously thought it to be obligatory that it was not barred from considering the trier of fact as the embodiment of the community standards. This Court reversed both jury decisions without one word of opinion as to its application in obscenity cases. We urge this Court, to grant a rehearing on the petitions presently so as to consider after briefing and argument the merits of this time honored approach to the problem that "I, A Woman" presents (*United States v. Kennerley*, 209 Fed. 119 (1913); *United States v. One Book Entitled Ulysses*, 5 F. 2d 182, 184; *United States v. One Book Entitled Ulysses*, 72 F. 2d 156, 157, cited in *Roth v. United States*, 354 U.S. 476, 489, n. 26; *People v. Noroff*, 58 Cal. Rptr. 172, 175; *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 903; *Grove Press, Inc. v. Gerstein*, 378 U.S. 577, 586; *Grove Press, Inc. v. Christenberry*, 276 F. Supp. 444, 447; *Grove Press, Inc. v. Christenberry*, 276 F. Supp. 433, 436; Justice Douglas dissenting; *Voldanski v. United States*, 249 F. 2d 840, 844, 845; Justice Stewart writing the opinion; *The Bill of Rights* by Justice Learned Hand, Harvard University Press at page 73.) See also the Petition for Certiorari of the Attorney General of Kentucky in *Austin v. Commw. of Kentucky*, October Term, 1966, No. 16.

Conclusion.

Respondent, in seeking a hearing and argument on the obscenity *vel non* issue, would respectfully point out that the State of Maryland has already been accorded that right in relation to its own obscenity statute and its application to a motion picture film. The Maryland film, in many respects, does not approach the significance of the Kentucky motion picture film. Since the basic issues are already before it, this Court, can only benefit by the further briefing and argument which would result from noting jurisdiction in the "I A Woman" case.

Respectfully submitted,

JOHN B. BROWNING,
Assistant Attorney General,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JOHN B. BROWNING,
Assistant Attorney General,
Counsel for Petitioner.